STATE OF MICHIGAN

COURT OF APPEALS

ALICIA ROSARIO,

Plaintiff-Appellant,

v

16481 TEN MILE ROAD, L.L.C., and JIM BURNEY/DO-RIGHT LAWN CARE,

Defendants-Appellees,

and

SHADOW WOODS MANOR, L.L.C.,

Defendant-Not Participating.

UNPUBLISHED
November 16, 2004

No. 249919
Macomb Circuit Court
LC No. 2002-000366-NO

Before: Cavanagh, P.J., and Kelly and H. Hood*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant, 16481 Ten Mile Road, L.L.C. ("Ten Mile"). We affirm.

Plaintiff slipped and fell on a snowy and icy sidewalk outside her apartment building, owned and operated by Ten Mile, sustaining back injuries. On appeal, plaintiff argues that the trial court should not have allowed Ten Mile to avail itself of the open and obvious defense in order to avoid liability for violation of a statutory duty, and that genuine issues of material fact exist regarding whether the dangerous condition presented by the snowy and icy sidewalk was open and obvious, and whether special aspects of the sidewalk rendered it unreasonably dangerous. We disagree with all three claims.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

It is undisputed that plaintiff was Ten Mile's tenant and, thus, its invitee. See *Stanley v Town Square Coop*, 203 Mich App 143, 149; 512 NW2d 51 (1993). An invitor has a common law duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). This basic duty to protect an invitee does not generally include removal of open and obvious dangers, i.e., those dangers that are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 3; 649 NW2d 392 (2002), quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). The test to determine if a danger is open and obvious is whether an average user with ordinary intelligence would have been able to discover the danger and risk presented upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002). The test is objective and the court should look to whether a reasonable person in the plaintiff's position would foresee the danger, not whether a particular plaintiff should have known that the condition was hazardous. *Corey*, *supra* at 5.

Here, plaintiff knew or would reasonably be expected to discover the danger presented by the snowy sidewalk; thus, the danger was open and obvious. By plaintiff's own admissions, she knew that it had snowed and rained the night before her accident. From the phone conversation she had with her co-worker, plaintiff understood that the conditions of the roads hindered the ability to travel. She even called into work based on this understanding. When her boyfriend, Ronnie Carroll, returned from his first attempt to leave for work, he informed her of the unfavorable weather conditions. With this knowledge, and at Carroll's request for her assistance, plaintiff elected to leave her apartment to help Carroll dig his car out from beneath the snow. Realizing that she could not walk with stability on the sidewalk, plaintiff used Carroll's arm to help her traverse through the snow as they walked to Carroll's vehicle. As she was walking back alone, she slipped and fell. Plaintiff testified that she did not see the ice underneath the snow and did not know that it was there until she slipped and fell on it, whereupon she testified that a "[b]ig patch of ice" appeared that could not be "miss[ed]." Even if plaintiff did not see the ice beneath the snow, a reasonable person knowing that it had rained the night before, on a cold, Michigan December night, and that road conditions were unfit for driving that morning, would have foreseen the danger presented by the snow-covered sidewalk. See *Corey*, *supra*; see, also, *Joyce*, *supra* at 238-240. Therefore, we agree with the trial court's determination that no reasonable juror could have concluded that the dangerous condition of the sidewalk was not open and obvious.

Further, we conclude that no special aspects made this open and obvious risk unreasonably dangerous. Contrary to plaintiff's argument on appeal, the condition of the sidewalk was not "effectively unavoidable." Plaintiff could have elected to remain inside her apartment, could have caused the sidewalk to be cleared, or could have walked around the sidewalk. Further, walking on the sidewalk did not give rise to a substantial risk of death or severe injury. See *Lugo*, *supra* at 518-519.

Finally, plaintiff argues that 10 Mile had a statutory duty, pursuant to MCL 554.139, to maintain the premises in reasonable repair and such duty cannot be circumvented by the open and obvious doctrine. However, as the trial court noted, plaintiff failed to plead such violation in either her complaint or amended complaint; accordingly, the trial court did not have authority to

find in plaintiff's favor with regard to this issue. See *Reid v Dept of Corrections*, 239 Mich App 621, 630; 609 NW2d 215 (2000).

Given our resolution of the other issues on appeal in favor of Ten Mile, we need not address Ten Mile's argument that plaintiff released it from liability for her injuries under the terms of the lease agreement.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Harold Hood